NO. 84-136

in the

Supreme Court

of the

United States

October Term, 1984

P.E.P., INC., ET AL.,

Petitioners,

vs.

MORAN MARITIME ASSOCIATES, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To The United States Court of Appeals For The Eleventh Circuit

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SUMMARY OF ARGUMENT

There is no basis for this Court to exercise certiorari jurisdiction in this cause. There is no conflict among or between any court; and there is no presentation of an important question for this Court's determination.

ARGUMENT

This is a very simple maritime salvage case which was tried non-jury by the District Judge who determined that the Petitioners had rendered salvage services, were entitled to a salvage award, and accordingly rendered the appropriate award. The Petitioners, unhappy with the amount of the award, appealed to the Eleventh Circuit Court of Appeals contending that: (1) the award was based upon erroneous principles; (2) the award was based upon a misapprehension of the facts; and (3) the award was grossly inadequate so as to constitute an abuse of discretion. Petitioners' allegations of erroneous principles were the same before the Eleventh Circuit Court of Appeals as they are before this Court and that is, that the District Judge refused to consider Respondents' alleged negligence in causing the initial grounding and Respondents' potential legal liability had there been catastrophic damage to the City of Fort Lauderdale from an explosion (which did not happen), or damage to the environment caused by pollution, (which did not happen). The Eleventh Circuit Court of Appeals found no error in the District Judge's refusal to consider these elements. These elements only go to the amount of the award or, if you will, the fund from which the award is satisfied. The District Judge had before it stipulated values of the tug and barge of $11,621,800.00. He awarded $2,800.00. We would

respectfully suggest to the Court that it was harmless error at best for the District Judge not to consider the additional elements as contended by Petitioners because it makes no difference whether the District Judge looks at a fund of $20,000,000.00 or $11,000,000.00 when he determines that the reasonable salvage award is $2,800.00. The Petitioner's last ditch attempt to "salvage" a greater award simply comes too late, without any justifiable basis, for as was recognized as long ago as 1840:

> It is well known, that in salvage cases the appellate courts of the United States, sitting in admiralty, are not disposed to encourage appeals . . . except where there has been some plain, clear, and determinate mistake of law or fact. The allowance of salvage rests in the exercise of the sound discretion of the court. ***The merits of such services rarely admit of any definite and exact computation . . . In matters of mere discretion, the mind of man must even be "varium et mutabile". It is on this account that it has become a general rule . . . of our appellate courts, sitting in admiralty, not to change the decree of the court below, unless there is an exceedingly strong case made out, of an abuse or palpable mistake in the exercise of its discretion in the decree of salvage. *Bearse v. Three Hundred and Forty Pigs of Copper*, Fed. 1193 (CC. Mass. 1840).

In this case the only salvage service rendered was radio advice given by one of the Petitioners to the tug captain. The advice was recorded and that recording was played to the District Judge. Additionally, the

recording was transcribed and the transcript of the recording was introduced into evidence for the Judge's review. In reviewing the radio transcript, the Trial Judge found only two minor instances where advice given by the pilot to the tug captain could be construed to have been of any benefit to the tug.

In evaluating the circumstances surrounding the salvage the following circumstances existed: (1) there was no fire; (2) there was no damage to Petitioners' boat; (3) there was no physical assistance rendered by the Petitioners, i.e., no lines were attached between the vessels, none of the Petitioners boarded either the tug or barge, the crew of the tug did not board the pilot boat; (4) while Petitioners were on the scene the gasoline spill and fumes were being carried away from them by the prevailing wind and flood tide; (5) Petitioners were not in any danger while they were on the scene; (6) Petitioners were on the scene only two and half hours; (7) no unusual or special skill was involved in the Petitioners efforts; and (8) the "salvage" occurred in port.

When the risk is inconsiderable and the service slight, the award should be little more than mere remuneration "pro opere et labore." *The High Cliff*, 271 F. 202 (5th Cir., 1921). The providing of advice is a low grade service because the salvor provides non-physical assistance and does not expose his property to a high degree of danger. Cf. *South American S.S. Co. v. Atlantic Towing Co.*, 22 F.2d 16 (5th Cir., 1927). The award should be lower when the salvage is rendered in a harbor because of the location of aid. Cf. *Sears v. S/S American Producer*, 1972 AMC 1647 (N.D. Cal., 1972);

The O.C. Hanchett, 76 F. 1003 (2d Cir., 1896): 3A *Benedict on Admiralty* Section 252 (7 Ed., 1980).

The discretion of the trial court in assessing the amount of salvage compensation is a well settled rule of law and is largely a matter of facts and circumstances. *The Dos Hermanos*, 10 Wheat, 306, 6 L.Ed 328 (U.S. 1825). The trial judge herein took into consideration the circumstances surrounding the salvage and determined that the advice given by Petitioners did not appreciably contribute to the success of the salvage. There has been no showing of any error or abuse of discretion on the part of the trial judge herein.

CONCLUSION

We would respectfully submit that Petitioners have failed to sustain their burden under Rule 19. The Court of Appeals correctly affirmed the Trial Court's final judgment in favor of Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: EDWARD R. FINK, Suite 309, 2190 S.E. 17th Street, Fort Lauderdale, Florida 33316 this 3 day of August, 1984.

BY: WILLIAM B. MILLIKEN